In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 190

MOUNT HOLLY-BURLINGTON BROADCASTING COMPANY, INC., PETITIONER

v.

WILLIAM S. HALPERN & LOUIS N. SELTZER d/b/a BURLINGTON BROADCASTING CO., AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION

Petitioner seeks certiorari primarily on the ground that the court below improperly substituted its judgment for that of the Commission. Although the Commission is of the view that it reached proper findings based upon an adequate record, and that the decision

below is erroneous, it has determined not to seek review by this Court.

The assignor[1] of the petitioner (hereafter referred to as Farina) was one of three applicants before the Federal Communications Commission for a new radio station in the Mount Holly-Burlington, New Jersey area. The Commission, after a comparative hearing, granted Farina's application, and denied the mutually exclusive applications of respondents Halpern & Seltzer, and of the third applicant (who thereupon dropped out of the proceedings). At issue before the Commission was the truthfulness of Farina's responses to questions on the Commission's application form concerning financial qualifications. Farina made the following responses (J. App. 109)[2]:

> 3. a. Amount of funds on deposit in bank or other depository.
>
> In excess of $54,000.
>
> b. Name and address of the bank in which deposited.
>
> Fidelity Union Trust, Newark, N.J.
>
> c. Name and address of the party in whose name the money is deposited.
>
> "John J. Farina, 321 Summer Ave., Newark, N.J."

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[1] The applicant before the Commission was John J. Farina, trading as Mount Holly-Burlington Broadcasting Company. Farina has since incorporated as Mount Holly-Burlington Broadcasting Company, Inc.

[2] The reference to "J. App." is to the printed joint appendix below.

d. Conditions of deposit (in trust, savings, subject to check, on time deposit, who may draw on account and for what purpose, or other condition).

Savings and checking accounts may be drawn upon by John J. Farina for any purpose.

e. Whether the funds were deposited for the specific purpose of constructing and operating the station.

No.

The Commission found that Farina actually had approximately $54,000 but that almost the entire sum was in a box in his home, only a few hundred dollars being in the bank named by Farina (Pet. 37). However, believing that questions 3(a) and (b) in the application form were somewhat ambiguous, and that Farina had no motive to deceive the Commission, the Commission found (contrary to the hearing examiner) that Farina was not guilty of any misrepresentation (Pet. 37).

Upon the appeal of Halpern & Seltzer, the court of appeals stated that the problem could not be disposed of by characterizing the questions as ambiguous, since the answers given were plainly incorrect (Pet. 40). The court believed that even if Farina could have misunderstood questions 3(a), (b), and (c), the answer to question 3(d) was not true because at least $53,000 of the sum was not in any savings or checking account, and because it was in fact available to Farina only upon the agreement of his parents that he might withdraw it (Pet. 40-41). In

the court's view, the materiality of Farina's failure to make full disclosure in these answers had to be evaluated in the light of the hearing examiner's doubts as to the reliability of his representations of certain community contacts (Pet. 40).* The court of appeals held that the Commission had not made adequate inquiry into the financial question, and remanded the case for fuller inquiry into the actual status of Farina's finances, his plans for financing the new station, the organizational expenses he had incurred, and his community surveys (Pet. 41-42). Judge Wright concurred, believing that further inquiry might be useful, despite the fact that the matters had already been passed on by the Commission, and despite his agreement with the Commission that the questions posed by the application were ambiguous (Pet. 42).

While the Commission believes that its prior decision was correct, it recognizes that a reviewing court has wide power to remand for the making of a fuller record, *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364. It does not appear that the remand ordered in this case was intended to create a new standard for review of Commission decisions. Furthermore, the decision of the court of appeals is, of course, interlocutory. In view of these considera-

* The examiner, it may be noted, did not disqualify Farina, but decided the case upon the comparative needs of the respective communities for a new station, finding that Mount Holly needed a station more than Burlington, and proposing a grant to another Mount Holly applicant who did not participate in the appeal after the Commission made a grant to Farina.

tions, no review by this Court was sought by the government.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

HENRY GELLER,
General Counsel,
Federal Communications Commission.

JULY 1964.

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